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U.S.D.C. Atlanta

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MAR - 3 2016

By:  Clerk
Deputy Clerk

KEN JOSEPH
Plaintiff

v.

BARCLAYS BANK DELAWARE
Defendant

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CASE# 1:16-cv-00029-AT-RGV

PLAINTIFF'S MOTION TO DISMISS SECOND CAUSE OF ACTION and
BRIEF IN SUPPORT

Plaintiff ("Joseph") hereby files **PLAINTIFF'S MOTION TO DISMISS SECOND CAUSE OF ACTION** of his complaint Pursuant to Rule 41 of the Rules of Civil Procedure.

INTRODUCTION

1. Currently pending before this Court is the motion to dismiss the second cause of action contained in plaintiffs' action, which includes the FAIR DEBT COLLECTION PRACTICES ACT ("FDCPA") violation.
2. Plaintiff's second cause of action includes the FDCPA violation against the Defendants, Barclays Bank Delaware ("Barclays")

BACKGROUND

3. On or about September 23rd, 2015 JOSEPH began to receive calls to his cell phone, 470-331-4557.
4. It appears that some or all of the calls was directed to a person whom last name is "Lewis or "Louis".
5. Defendant's phone systems and software have the capacity to predictively dial.
6. On October 29th 2015, Joseph sent a Notice of Intent to Litigate in attempt to litigate the damages.
7. Joseph filed this lawsuits (15M35106) In The Magistrate Court of Gwinnett County State of Georgia each for violations of the Telephone Consumer Protection Act (TCPA) 227., 47 USC § 227 *Sec. seq*, and the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C § 1692 *Sec. seq*.
8. This complaint was removed to the UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION.
9. On January 12, 2016 Defendant filed a Motion to Dismiss.
10. On January 26th, Joseph filed response to Defendant's Motion to Dismiss.
11. Defendant files a reply on on 15th of February.

DISCUSSION

12. A plaintiff is generally entitled to voluntarily dismiss his or her case at any time before trial or hearing begins. *Saddle Signs, Inc. v. Adrian*, 272 Ill. App. 3d 132, 135, 650 N.E.2d 245, 247 (1995). Plaintiffs have an almost absolute right to take a voluntary dismissal absent an unequivocal conflict between a specific rule of the supreme court and section 2-1009 of the Code (735 ILCS 5/2-1009 (West 1996)).
13. In 1994, our state legislature codified the rule in *Gibellina*. Under the codification, voluntary motions to dismiss are governed by section 2-1009 of the Code, which provides in part:

"(a) The plaintiff may, at any time before trial or hearing begins, upon notice to each party who has appeared or each such party's attorney, and upon payment of costs, dismiss his or her action or any part thereof as to any defendant, without prejudice, by order filed in the cause. "
14. If the plaintiff strictly complies with the requirements of the statute, the trial judge does not have the discretion to deny plaintiff's motion.
15. *Vaughn v. Northwestern Memorial Hosp.*, 210 Ill. App. 3d 253 (1st Dist. 1991). Whether or not a trial has begun is a legal question. *Kahle v. John Deere Co.*, 104 Ill. 2d 302 (1984); *Saddle Signs, Inc. v. Adrian*, 272 Ill. App. 3d 132 (3rd Dist. 1995).

16. In most cases, a voluntary dismissal should be granted unless the [opposing party] will suffer clear legal prejudice, *other than the mere prospect of a subsequent lawsuit*, as a result.””” *Id.* (quoting *Potenberg*, 252 F.3d at 1255 (quoting *McCants v. Ford Motor Co.*, 781 F.2d 855, 857 (11th Cir. 1986)) (emphasis and alteration in original). *See also 4 Points Logistics*, 2007 U.S. Dist. LEXIS 50865 at *10; *Tuyet Tran Gonzalez v. P&G*, 2008 U.S. Dist. LEXIS 16872, *7 (S.D. Cal. Mar. 4, 2008) (“A court should grant a Rule 41(a)(2) motion for voluntary dismissal unless the defendant will ‘suffer.

CONCLUSION

17. Due to the above reasons, Plaintiff respectfully move the court to dismiss his second cause of action (Which contained the FDCPA violation) of Plaintiff's complaint against all the Defendants without prejudice.

Dated: February 29th, 2016

Respectfully submitted,

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Service to:

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the document above was sent by first class mail USPS to counsel of record listed below for Defendant.

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Dated: February 29th, 2016

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